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No. 836

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Supreme Court of the United States

October Term, 1967

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
AID ASSOCIATION FOR LUTHERANS,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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November 17, 1967

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JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
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WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Appellants,

AGAINST

UNITED STATES OF AMERICA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, Aid Association for Lutherans, and Woodmen of the World Life Insurance Society are mutual life insurance companies owning $29,953,000 * of bonds of the Erie-Lackawanna Railroad Company (EL). Appellants were granted leave by the ICC to intervene in Finance Docket No. 21510 in which EL and others sought approval of their inclusion in the Norfolk and Western Railway (N&W) system.

Appellants challenge the final order of the ICC in F.D. No. 21510 only insofar as it fails to include a clear reten-

* Schedule 1 to Appellants' complaint in the District Court.

tion of jurisdiction for the protection of the EL bondholders. While the final order does include a general provision * retaining jurisdiction, that provision makes no specific reference to EL bondholders, and is so vague and indefinite as to leave the position of EL bondholders in doubt. Appellants ask that so much of the final order of the ICC as purports to deal with post-consummation relief be clarified to confirm the Commission's retention of jurisdiction to give EL's bondholders protection, on application, should future developments show it to be necessary and equitable.

---

* The order of the Presiding Officer, Commissioner Webb, (served December 22, 1966) herein (F. D. No. 21510) provided (p. 168):

> "Jurisdiction is reserved to receive such petitions, institute such investigations, and make such orders to accomplish *the objectives and purposes of the plan* for inclusion *and other terms and conditions prescribed herein,* and this reservation of jurisdiction is in addition to the authority to issue supplemental orders provided in Section 5(9) of the Act;" (All emphasis throughout this Jurisdictional Statement is added unless stated otherwise.)

In approving the Report and Order of Commissioner Webb, the ICC adopted the quoted provision. In its supplemental order of June 9, 1967, entered after hearing the objections of the EL bondholders, the ICC further provided:

> "It is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior report and order and in said supplemental report of the Commission, and to those orders which may be issued under section 5(9) of the Interstate Commerce Act;" (Not printed. Page 2 of Mimeographed Order.)

Such clarification, even if procedurally it should necessitate remand to the ICC, would require no delay in the Penn-Central merger or in EL's inclusion in the N&W system, which these Appellants have made clear throughout they believe is in the public interest and do not wish to see delayed.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The memorandum order of July 26, 1967, and the October 19, 1967, opinion of the statutory three-judge court convened in the Southern District of New York are not yet reported, but copies are attached to the Jurisdictional Statement of N&W in its appeal as Appendices A and B thereto, and said appendices are incorporated herein by reference. Appendix 1 hereto sets forth that portion of the District Court's opinion to which this appeal is directed. The Report of the Interstate Commerce Commission, dated June 9, 1967, is reported at 330 I.C.C. 780, and the Commission's report on reconsideration, dated August 10, 1967, as modified on September 1, 1967, is reported at 331 I.C.C. 22. Copies of the Commission's reports and orders have been lodged with the Clerk of the Court.

JURISDICTION

This suit was brought under 5 U.S.C. §704 and 28 U.S.C. §§1336, 2284 and 2321-25 to modify the supplemental order of the Interstate Commerce Commission,

dated June 9, 1967, in Finance Docket No. 21510, *et al.*, as supplemented by its orders dated August 10, 1967, and September 1, 1967. The judgment of the District Court dismissing this complaint was entered on October 19, 1967. Appellants' notice of appeal was filed in that court on November 3, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b).

QUESTIONS PRESENTED

1. Did the District Court err in holding that Appellants were not entitled to challenge the final ICC order because they themselves had not "developed a record at the hearing [before the ICC Examiner] and then come forward with specific suggestions," where the ICC had granted Appellants' petition to intervene and Appellants had filed timely exceptions based on the record already developed before the ICC Examiner?

2. Did the ICC violate the provision of Section 8(b) of the Administrative Procedure Act which requires findings, the requirement of Section 5(2) of the Interstate Commerce Act that the inclusion plan be "just and reasonable," and the express requirement in the ICC's initial order that the plan be "equitable to all parties involved," in failing to make any finding as to whether the plan is equitable to EL bondholders, and, despite the clear record developed before the ICC that the plan will jeopardize the EL bondholders' security, in failing to provide any appropriate safeguard?

STATUTES INVOLVED

The statutes involved in this case are: Administrative Procedure Act, §§7(d), 8(b), 10(a), 10(c), 10(e), 5 U.S.C. §§556(e), 557(c), 702, 704, 706; 28 U.S.C. §§1253, 1336, 1398(a), 2101(b), 2284, 2321-25; Interstate Commerce Act, §5(2), 49 U.S.C. §5(2). Also involved are Rules 19a and 82 of the Federal Rules of Civil Procedure. The text of these statutes and rules is attached as Appendix C to N&W's Jurisdictional Statement and is incorporated herein by reference.

STATEMENT

At the very outset, these Appellants wish to emphasize, as they did before the Commission and in the District Court, that they favor the prompt inclusion of EL in the N&W system. They ask only for the protection of their vital interests by having it made clear that the Commission retains post-consummation jurisdiction to afford relief to EL bondholders if future developments should so require. This clarification would require no delay in the inclusion of EL in the N&W system.

In this "Inclusion" case, the proceedings before the Commission were initiated by EL, the Delaware and Hudson Railroad Corporation (D&H) and the Boston and Maine Corporation (B&M), all of whom filed petitions for inclusion in the N&W. Such petitions were authorized by a condition (Appendix O) attached to the Commission's order which approved N&W's merger with the Nickel Plate and related transactions. *Norfolk & W. Ry. and New York, C. & St. L. R. R.—Merger*, 324 I.C.C. 1 (1964). Under Appendix O the Commission retained jurisdiction to direct inclusion of the three carriers if "found

consistent with the public interest . . . under such terms as may be found *equitable to all parties involved"* (324 I.C.C. at 148).

The Report and Order recommended by the ICC examiner, following hearings on the above petitions for inclusion, was served on December 22, 1966. The Commission ordered that exceptions thereto be filed on or before March 1, 1967. Within said time Appellants served and filed their petition to intervene and specific exceptions. By Order of March 7, 1967 the Commission permitted the Appellants to intervene and accepted the filing of their exceptions. No party objected to such intervention of Appellants or to the timeliness of the filing of said exceptions.

Appellants requested, and were granted, permission to participate in support of their exceptions in the oral argument before the Commission on April 20, 1967, without any objection or question being raised by any party.

In their exceptions submitted to the ICC (pp. 3-4) Appellants suggested different provisions to afford EL bondholders protection, including specifically its retention of jurisdiction by the ICC as they continued to do in their brief (pp. 35-36) and reply brief (p. 19) in the Court below.

Neither in its oral argument before the District Court nor in any of its briefs has the Commission, which set the time for the filing of exceptions, raised any question whatsoever about the timeliness or proper filing of Appellants' exceptions. Nor has the Commission ever contended that the right of Appellants to request review of its orders herein depends on their having actively participated in the hearing.

Nevertheless, in its decision below the District Court held Appellant bondholders were not entitled to request review because they had not "developed a record at the hearing and then come forward with specific suggestions" (Appendix 1 hereto).

This, we submit, is a novel holding presenting a procedural question of substantial importance not only in Section 5(2) proceedings (of which many are now pending and several others proposed) but also in other proceedings under the Interstate Commerce Act and in proceedings under various other Acts before administrative agencies.

The approval of this inclusion plan by the Commission, without a clear reservation of post-consummation jurisdiction to protect bondholders, raises substantial questions as to Section 5(2), which will have an impact far beyond the instant case. Indeed, N&W itself and another large railroad now have pending before the Commission their Section 5(2) application (in which they have finished putting in their opening case) requesting the use of exactly the same device used here to circumvent the rights of bondholders (ICC F.D. No. 23882).

The "phantom merger"-control device of circumvention used here is as follows:

> N&W, an important competitor of EL, is to form two new Delaware corporations, "NC" and "New EL". N&W will own all the common stock of NC, which in turn will own all of the stock (1000 shares) of New EL. New EL is to be formed as a "mere corporate shell" * for the purpose of merging pres-

* The term used by the Supreme Court in *County of Marin* v. *United States*, 356 U. S. 412, 418 (1958) in which it overturned the ICC's approval under §5(2) of a "paper transaction" designed by a carrier for the purpose of circumventing its legal obligation.

> ent EL into it, receiving EL's assets (subject to existing mortgages) and assuming EL's existing debt. N&W, however, is to assume no liability whatsoever to New EL or its bondholders.

Thus, there will be no public stockholders of New EL, interested solely in its financial well-being and constituting a safeguard to EL bondholders because of their right to call EL management to account unless it operates the road solely for its own benefit.* Present EL stockholders, upon the exercise of their right to convert (within five years or less) the NC preferred stock receivable by them into N&W common, will be interested only in the operations and revenues of N&W.

But the bondholders of EL, who are prior and paramount to its stockholders, will have to look for their income and security solely to New EL, which will be operated under the complete control of its competitor-parent, N&W. EL bondholders will have substituted a new obligor (New EL), whose lines betwen Chicago and Buffalo are paralleled by those of N&W (330 I.C.C. 829-30); and N&W will have the motive and the opportunity to use its control of New EL to increase the traffic and income of its own lines rather than those of New EL, *e.g.*, by diversion of traffic and other benefits from New EL, to the detriment of New

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* N&W recognizes (Reply Brief of Sept. 25, 1967, p. 31 n.):

> "The provision for merger of EL into the new N&W subsidiary "New EL" is *to eliminate any minority interests* so that N&W will acquire 100% ownership of the equity in EL."

EL and these Appellants. The advantage to N&W of using its own lines in order to handle traffic diversions was clearly shown by lengthy testimony * concerning the former merger proposal (for which the present plan of control was substituted) of an N&W-appointed joint committee, whereby EL's present double-track line between Chicago and Buffalo would be converted into a single-track line and N&W's largely single-track line would be double-tracked. Clearly it would be to N&W's interest to handle on its own lines as much of EL's present traffic as it could divert, absent merger.

The incentive for N&W to operate New EL for N&W's benefit (to the detriment of EL bondholders) is greatly increased by the fact that N&W is a more efficient earner than EL—producing approximately 26¢ of net income per dollar of revenue as against EL's 6¢ (330 ICC at 808).

A further incentive for N&W to use its control of New EL to maximize its own revenues rather than those of EL, lies in the advantage to N&W of being able to buy in New EL's debt securities at substantial discounts. This—"[o]nce N&W has control of EL"— is one of the ways asserted by EL through which N&W will obtain substantially all of full merger benefits, without full merger of EL. (See its ICC Reply Brief of April 1, 1967, Point IV, p. 109.)

Apart from these strong incentives constituting realities which must be faced in situations of control generally, a further imperative need for protection lies in the special circumstances here that EL's bonds include more than $75,000,000 of *income* bonds, whose interest is contingent on earnings. The maximum (3 years) contingent interest which can accumulate on the income bonds (approximately

* EL's Stmt. 4, pp. 4-6, 31-37, 40, 48.

$10,000,000) has already accumulated. As shown in some detail at pages 23-24 of Appellants' brief below, there exists a highly compelling deterrent against N&W's permiting New EL to have in any future year net income available for contingent charges since it would first have to be applied to the payment of such large amounts of contingent interest before N&W could receive a penny of dividends from New EL—and then in the year immediately following any such payment the income bond interest would start accumulating again (up to the $10,000,000 maximum). By diverting EL income to its own lines N&W would receive benefits in a form other than dividends and without the necessity of discharging EL's accumulated income bond interest—possibly during the fifty years until the income bonds mature (in 2015 and 2020). By contrast, an EL controlled by public shareholders, as at present, would be interested in paying off accumulated interest as soon as possible in order that stockholders could receive dividends.

The District Court dismissed these considerations on the ground that:

> "The smaller traffic gains and control savings *estimated* for EL reflect N&W's *inability* in a control situation to do the very things the bondholders fear."

Mere "Estimates" by an N&W appointed committee, that with control of EL the net annual gain to N&W would be $1.8 million, as compared with $17 million under merger,* hardly reflect "inability" of N&W to realize the much larger gain at the expense of New EL's earnings. The Court thus fell into the same error, we submit, as the Commission in assuming that N&W will be careful not to realize more savings than have been estimated, without including in the plan any safeguard against the possibility that this as-

* Report of Dec. 22, 1966, p. 85.

sumption is not fully borne out. In this connection it is highly significant that EL, in its last filing with the Commission (its Reply Brief of April 1, 1967), repeatedly asserted that:

> "N&W will ultimately * obtain all, or substantially all, of full merger benefits,"

and

> "it is simply inconceivable that N&W will not ultimately * merge with EL (*unless N&W finds it can obtain most of that potential gain while EL is merely a 100% controlled subsidiary*)" (pp. 106, 107, et seq.).

The Court below further suggested that the safeguards bondholders now seek are "in large measure" provided by courts of equity. The case authority cited by the Court does not support the argument that courts of equity would be helpful in these circumstances.** The suggestion is also irrelevant since the plan should not have been approved under Section 5(2) unless the Appellants received equitable treatment. The general legal duty imposed by courts on the stockholders of a corporation with respect to its bondholders—to avoid a fraud on creditors—is obviously far narrower in scope than the express statutory duty on

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* By "ultimately," EL suggested that it meant "in the early 1970's" (*Id.*, p. 106).

** Those cases [*Farmers Loan & Trust Co.* v. *New York & Northern Ry.*, 150 N. Y. 410 (1896); *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483 (1919)] are hardly relevant here. The former case involved what amounted to outright fraud on minority stockholders. The latter case is more properly viewed as a practical lesson on why judicial relief *after the fact* should not be relied on, since the litigation there, started in 1888, continued in the federal courts until 1929. See *Young* v. *Southern Pacific Co.*, 34 F. 2d 135 (2d Cir. 1929).

the ICC under Section 5(2) to approve the N&W's acquisition of the EL only on terms that are fair and equitable to all parties.

The approved plan contains nothing to prevent N&W from realizing the above advantages to itself at the expense and to the detriment of EL bondholders.

POINT I

The District Court erred in holding that Appellants are not entitled to challenge the final ICC order because they themselves had not "developed a record at the hearing and then come forward with specific suggestions", where the ICC had granted Appellants' petition to intervene and Apellants had filed timely exceptions based on the record already developed before the ICC Examiner.

In view of the fact that Appellants had been granted leave by the ICC to intervene in F.D. No. 21510 and had by timely exceptions urged upon the ICC the same objections that it later raised in the District Court, the District Court erred as a matter of law in dismissing Appellants' complaint on the above stated ground.

There was no need for Appellants to "develop a record" before the ICC since Appellants were content to rest on the record already developed through the many months of hearings. Further, there was no basis for making suggestions any more specific than those in fact advanced by Appellants as to an appropriate protective order for the EL bondholders since any such specific provision would depend upon and must be consistent with whatever terms the Commission might finally determine, then the subject

of so many exceptions by various parties, in this very complex situation.*

Contrary to the implication of the District Court that Appellants made no "specific suggestions," Appellants suggested, in all their requests for relief filed with the Commission and the Court, different forms of possible relief. Throughout such requests Appellants have asked, as the minimum relief to which they are entitled, a specific reservation of jurisdiction by the Commission. In this appeal Appellants ask only that the Commission's reservation dealing with post-consummation relief be clarified for their protection.

The statutory right to review an order of the Commission is not conditioned upon developing a factual record before it and then coming forward with specific suggestions. 28 U.S.C. §§2321-25. Appellants here are perfectly willing to stand or fall on the record in this case. The possible diversion of traffic from EL by N&W, and the incentives to do so, are fully developed in the record, and little could have been added thereto by the participation of bondholders in the hearings. If it is held that each holder of debt securities of a carrier must, to save his statutory right of appeal, develop a record before the Commission, the present lengthy proceedings of that Commission will be even more lengthy, and to no constructive end. In addition, apparently each indenture bond trustee

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* The presiding judge in the court below, in referring to the problems to be worked out by the Commission, appropriately referred to the inherent "permutations and combinations" (Tr. of Sept. 28, 1967, p. 62).

(which are often numerous * and customarily do not participate in Section 5(2) proceedings) would, at its peril, have to "develop a record" and come forward with specific suggestions. It is respectfully submitted that proceedings under Section 5(2) of the Interstate Commerce Act neither call for nor contemplate the condition precedent imposed by the Court below.

Indeed, the Commission's General Rules of Practice clearly establish that when intervention is allowed, the intervenor becomes a party and is entitled to all the rights and privileges of a party. See Anderson, *ICC Practice and Procedure* 156 (1966). Rule 1.72(e) of those Rules provides:

> "Leave [to intervene] will not be granted except on averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding." 49 C. F. R. §1.72(e).

This Court has long recognized that the rights of a party to an ICC proceeding who has a justiciable interest include the right to challenge the resulting order in those proceedings:

> "For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of §17 of the Interstate Commerce Act, the intervener becomes a

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* There are 24 indenture trustees under different issues of EL bonds. The indenture trustees of The Pennsylvania Railroad and of the New York Central System together total 28 (Moody's 1967 Transportation Manual, pp. 707, 363, 656).

party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel. The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest. No case has been found in which either this Court, or any lower court, has denied to one *who was a party* to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission but did not do so, have been allowed to maintain such suits where the requisite interest was shown." *Chicago Junction Case,* 264 U. S. 258, 268-69 (1924).

POINT II

The ICC violated the provision of Section 8(b) of the Administrative Procedure Act which requires findings, the requirement of Section 5(2) of the Interstate Commerce Act that the inclusion plan be "just and reasonable," and the express requirement in the ICC's initial order that the plan be "equitable to all parties involved," in failing to make any finding as to whether the plan is equitable to EL bondholders, and, despite the clear record developed before the ICC that the plan will jeopardize the EL bondholders' security, in failing to provide any appropriate safeguard.

Section 5(2) of the Interstate Commerce Act specifically provides that in approving a transaction submitted to the ICC thereunder the ICC must find that the terms and conditions of the proposed plan are "just and reasonable." Pursuant to its authority under Section 5(2), the Commission required that any inclusion of EL be on "terms

equitable to all parties involved" (Appendix O, 324 I. C. C. at 148).

In determining whether the terms are just and reasonable it is the Commission's duty "to see that minority interests are protected" *Schwabacher* v. *United States*, 334 U. S. 182, 201 (1948). No merger which is unfair to bondholders could meet this criterion. As the Commission put it in *Cleveland, C., C. & St. L. Ry.—Operating Agreement*, 320 I.C.C. 430, 438 (1964):

> "This Commission has power in determining the public interest to consider whether the proposed agreement accords the minority stockholders *and bondholders* of the Peoria the just and reasonable treatment to which they are entitled. *An agreement which is not fair to all of the stockholders and bondholders could not be in the public interest.*" *

In *Schwabacher* this Court passed upon the rights of stockholders to equitable treatment under §5(2). The Court there held that the Commission has a special obligation to see that equity is done to a class of stockholders where, "the terms of the merger have been imposed by management interests adverse to [that] class of stockholders." 334 U. S. at 201. This special obligation is no less

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* In the recent Penn-Central decision, *B. & O. R. R.* v. *United States*, 386 U. S. 372, 456-57 (1967), Mr. Justice Douglas, dissenting in part, said (p. 210):

> "The question whether the Penn-Central merger is in the 'public interest' therefore cannot be resolved until the fate of these three protected roads is determined. They too have stockholders *and bondholders*. They too service shippers, consumers and communities."

meaningful where management's interest is adverse to the bondholders.

In light of the foregoing statutory requirements the Commission erred in approving the inclusion plan without making any findings as to whether or not the plan is fair and equitable to the EL bondholders. Nowhere in any of its Reports does the Commission ever refer to EL bondholders or their claims—except that in the first paragraph of its Report of June 9, 1967, it lists these interveners as having filed exceptions, without even stating their nature or basis. Nowhere does the Commission even mention the effect of the plan on these bondholders' interests or deal with their requests for protection—much less discuss them.

In failing to do so the Commission disregarded the requirement of §8(b) of the Administrative Procedure Act, 5 U. S. C. §557(c), that agency decisions

> "include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. . . ."

The Administrative Procedure Act's requirement of findings, conclusions and reasons on all material issues was pointedly designed to protect parties to administrative proceedings "against careless or arbitrary action." 2 Davis, *Administrative Law* §16.05, p. 446 (1958). This Court emphasized its determination to uphold the statutory requirement in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489 (1942):

> "An insistence upon the findings which Congress has made basic and essential to the Commission's

> action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' . . . Hence the requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence."

The interests of the intervening bondholders here are directly affected by, and they have great cause to be concerned with, the plan approved by the Commission. Nonetheless, the Commission has omitted even any reference to or findings concerning their objections or to state whether the plan is fair to them.

Unless the Commission's reservation of jurisdiction is sufficient to protect EL bondholders, N&W will be in a position materially to impair, if not destroy, substantial rights of these Appellants.

Appellants have no desire to delay putting the inclusion plan into immediate effect. Accordingly, Appellants at this stage only request a clarification of the general provision of the ICC order dealing with post-consummation relief.*

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* As it presently reads, that general provision retaining jurisdiction (quoted at the outset of this Jurisdictional Statement) is so vague and indefinite as to leave the position of the EL bondholders in doubt, particularly since in its orders and reports the ICC nowhere refers to or deals with any of the points raised by the EL bondholders before the ICC.

Conclusion

For the foregoing reasons, jurisdiction of this appeal should be noted and the case set down for full hearing.

In the event this Court decides to dispose of this appeal without full hearing, we submit that the Court should clarify, and if necessary remand to the ICC, so much of the final order in F.D. No. 21510 as deals with post-consummation relief, in order to make clear the ICC's continuing jurisdiction to give EL bondholders relief, on application, should future developments prove that to be necessary and equitable.

November 17, 1967

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APPENDIX 1

Excerpt From Opinion of District Court (pp. 62 and 63)

"Complaint of E-L Bondholders.

"John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, Aid Association for Lutherans and Woodmen of the World Life Insurance Society, holding large amounts of E-L bonds, ask for "equitable safeguards necessary to prevent the circumvention of their rights as bondholders." Their main point is that "N & W will have the incentive to use its control of New E L to increase the traffic and income of its own lines rather than those of New E L, e.g., by diversion of traffic and other benefits from New E L, to the detriment of New E L" and its bondholders. The alleged incentives are various—N & W can make more money by handling traffic on its own more efficient line west of Buffalo; while the present E-L stockholders have an interest in earning net income and paying the interest charges in order to clear the way for the declaration of dividends, N & W will prefer that New E-L should not have net income available for payment of the contingent interest and arrearages on the income bonds; and it will be glad to see the price of E-L bonds depressed in order to facilitate market purchases or tender offers.

"Before submitting any plan for inclusion in N & W, E-L wrote thirteen of its major bondholders, including two of the plaintiffs and explaining both the greater advantages of merger and its disbelief that the Commission would approve this unless the E-L bondholders would consent to modification of the bonds. They refused. It was for this reason that E-L proposed stock control by N & W rather than merger, with attendant lesser economies and traffic gains and lower exchange ratios for its stockholders. The bondholders did not participate in the hearing before Commissioner Webb; on the last day for filing exceptions to his Report, they sought leave to inter-

vene and to file an exception asking the Commission to impose some sort of safeguard for their benefit.

"We find no merit in the bondholders' complaint. The Interstate Commerce Act contemplates acquisitions of control by sale of assets subject to existing indebtedness as well as by merger or consolidation, which, as E-L correctly thought, would have been inequitable to N & W unless E-L's debt was modified. The bondholders do not contend that the indentures securing their bonds forbid a sale of assets. The smaller traffic gains and control savings estimated for E-L reflect N & W's inability in a control situation to do the very things the bondholders fear. While no one can guarantee that N & W may not abuse its position, courts of equity will still sit. The safeguards the bondholders seek are furnished in large measure by the principle of fiduciary responsibility recognized in such leading cases as *Farmers Loan & Trust Co.* v. *New York & Northern Ry.*, 150 N. Y. 410 (1896), and *Southern Pacific Co.* v. *Bogart*, 280 U. S. 438 [*] (1919). If they wished more than this they should have developed a record at the hearing and then come forward with specific suggestions. Failing to have done this, they cannot properly request a remand."

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* The correct style and citation of this case is *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483.